Nos. 04-55, 04-57

In The Supreme Court of the United States

STATE OF MICHIGAN, ET AL.,

Petitioners,

v.

YELLOW TRANSPORTATION, INC.,

Respondent.

STATE OF MICHIGAN, ET AL.,

Petitioners,

v.

SCHNEIDER NATIONAL CARRIERS, INC., ET AL.,

Respondents.

On Petitions For Writ Of Certiorari To The Michigan Court Of Appeals

BRIEF IN OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Congress in 1991 directed the former Interstate Commerce Commission ("ICC") to prescribe new and more simplified standards under which states are permitted to charge fees for registration of interstate motor carrier operations. 49 U.S.C. §11506(c)(1) It specified that these new standards "shall establish a fee system" that "will result in a fee for each participating State that is equal to the fee * * * that such State collected or charged as of November 15, 1991." 49 U.S.C. §11506(c)(2)(B)(iv)(III). In interpreting these standards, the ICC specifically ruled that the term "fee * * * collected or charged as of November 15, 1991" would be interpreted to refer to the fees which a state was collecting or charging to allow operations on November 15, 1991, rather than to fees which a state might have announced and begun to receive in advance of that date for operations during 1992.

The question presented is whether the Michigan Court of Appeals was correct in affording deference to the ICC's finding under principles announced by this Court in *Chevron USA, Inc. v. National Resources Defense Council, Inc.*, 467 U.S. 837 (1984) and *Yellow Transportation, Inc. v. Michigan*, 537 U.S. 36 (2002).

PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceedings are set forth in the case caption. Yellow Transportation, Inc., Respondent in No. 04-55, is a wholly owned subsidiary of Yellow Roadway Corporation, a publicly held corporation. The Respondents in No. 04-57, Schneider National Carriers, Inc.; Schneider Transport, Inc.; Schneider National Bulk Carriers, Inc.; Schneider Tank Lines, Inc.; and Schneider Specialized Carriers, Inc. are wholly owned subsidiaries of Schneider National, Inc. No publicly held corporation owns ten percent or more of the stock of Schneider National, Inc.

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RESPONSE TO PETITIONS FOR WRIT OF CERTIORARI

Respondents Yellow Transportation, Inc. ("Yellow"); Schneider National Carriers, Inc.; Schneider Transport, Inc.; Schneider National Bulk Carriers, Inc.; Schneider Tank Lines, Inc.; and Schneider Specialized Carriers, Inc.; (collectively, "Schneider") submit their joint[1] Brief in Opposition to the Petitions for Writ of Certiorari in Nos. 04-55 and 04-57.

OPINIONS AND ORDERS BELOW

No. 04-55

1. *Yellow Freight System, Inc. v. State of Michigan*, Michigan Court of Claims, March 13, 1996 ("*Yellow Freight I*") (Yellow Pet. App. 26a-29a)

2. *Yellow Freight System, Inc. v. Michigan*, 231 Mich. App. 194, 585 N.W.2d 762 (1998) (Resp. App. 22b-39b) ("*Yellow Freight II*") (affirming *Yellow Freight I*)

3. *Yellow Freight System, Inc. v. Michigan*, Michigan Court of Appeals, November 18, 1998 (denying rehearing)

4. *Yellow Freight System, Inc. v. Michigan*, 464 Mich. 21, 627 N.W.2d 236 (2001) ("*Yellow Freight III*") (reversing *Yellow Freight II*)

[1] Because the Petitions and underlying issues in Nos. 04-55 and 04-57 are virtually identical, Respondents have elected to file a joint response. Appendix references to "Yellow Pet. App." and "Schneider Pet. App." will refer to Petitioners' Appendices in Nos. 04-55 and 04-57 respectively.

5. *Yellow Transportation, Inc. v. Michigan*, 537 U.S. 36 (2002) (Resp. App. 40b-55b) ("*Yellow Transportation IV*") (reversing *Yellow Freight III*)

6. *Yellow Freight System, Inc. v. Michigan*, 468 Mich. 862, 659 N.W.2d 229 (Table) (2003) (vacating *Yellow Freight III*)

7. *Yellow Transportation, Inc. v. Michigan*, 257 Mich. App. 602, 669 N.W.2d 553 (2003) (Yellow Pet. App. 3a-21a) ("*Yellow Transportation V*") (reaffirming *Yellow Freight II*)

8. *Yellow Transportation, Inc. v. Michigan*, 469 Mich. 1026, 677 N.W.2d 331 (2004) (Yellow Pet. App. 1a-2a) (denying leave to appeal)

No. 04-57

1. *Schneider National Carriers, Inc., et al. v. Michigan*, Michigan Court of Claims, March 13, 1996 (Schneider Pet. App. 11a-22a) ("*Schneider I*")

2. *Schneider National Carriers, Inc., et al. v. Michigan*, Michigan Court of Appeals, May 14, 1999 (Schneider Pet. App. 8a-10a) ("*Schneider II*") (reversing *Schneider I*)

3. *Schneider National Carriers, Inc., et al. v. Michigan*, 464 Mich. 867, 631 N.W.2d 343 (2001) (vacating *Schneider II* and remanding for reconsideration in light of *Yellow Freight III*)

4. *Schneider National Carriers, Inc., et al. v. Michigan*, 247 Mich. App. 716; 637 N.W.2d 838 (2001) ("*Schneider III*") (deciding issues not addressed in *Schneider II*)

5. *Schneider National Carriers, Inc., et al. v. Michigan*, Michigan Court of Appeals, December 7, 2001 (denying rehearing of *Schneider III*)

6. *Schneider National Carriers, Inc., et al. v. Michigan*, 468 Mich. 862, 659 N.W.2d 228 (2003) (Schneider Pet. App. 6a-7a) (vacating *Schneider III*)

7. *Schneider National Carriers, Inc., et al. v. Michigan*, Michigan Court of Appeals, August 5, 2003 (Schneider Pet. App. 3a-5a) ("*Schneider IV*") (reaffirming *Schneider II*)

8. *Schneider National Carriers, Inc., et al. v. Michigan*, 469 Mich. 1026, 677 N.W.2d 331 (2004) (Schneider Pet. App. 1a-2a) (denying leave to appeal)

STATEMENT OF THE CASE

These cases involve an interpretation of an almost infinitesimally minor detail of a regulatory statute by the former Interstate Commerce Commission ("ICC"), with which the State of Michigan and its regulatory agency, the Michigan Public Service Commission ("MPSC"), have elected to disagree. No other state has followed Michigan's interpretation, which was accepted by only two of the 17 judges who considered these cases in the Michigan courts, and there have been no other cases involving this issue.

The statutory provision in question, 49 U.S.C. §11506(c)(2)(B)(iv)(III),[2] provides that a state may assess a fee for certain commercial motor vehicle registrations only if that fee is "equal to the fee, not to exceed $10.00 per vehicle, that such state collected or charged as of November

[2] Recodified as 49 U.S.C. §14504 effective January 1, 1996. References in this brief are to the original version.

15, 1991." In the course of its proceeding interpreting and implementing this statute at the direction of Congress, the ICC specifically addressed how it would apply this language to a situation in which a state was charging no fees for operations on November 15, 1991 itself but prior to that date had announced and begun to collect fees in advance for periods beginning after November 15, 1991.

Congress not surprisingly had been silent on this question in enacting the statute. The ICC, however, concluded that the statutory language should be read to base the fee limits on fees being charged and collected for operations on the November 15, 1991 determination date rather than on fees for future periods which states had begun to receive in advance of that date. *American Trucking Associations – Petition for Declaratory Order – Single State Insurance Regulation*, 9 ICC 2d 1184, 1192, 1195 (1993) (14b, 18b). Michigan, however, refuses to defer to this interpretation under the *Chevron*[3] doctrine, notwithstanding the clear indication to the contrary provided by this Court's prior opinion[4] in this very case issued less than 20 months ago.

1. Regulatory Background

The issue in these cases arises from actions by the Respondent motor carriers to obtain refunds of motor vehicle registration fees improperly collected by the MPSC. At all times pertinent to this litigation, Respondents have

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[3] *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

[4] *Yellow Transportation, Inc. v. Michigan*, 537 U.S. 36 (2002) (40b-55b).

been for-hire motor carriers performing transportation in interstate commerce under certificates and permits issued by the ICC and its successors.[5] For years prior to 1994, Congress through a predecessor version of 49 U.S.C. §11506 had permitted states to require registration of interstate carrier certificates or permits as long as that registration complied with standards issued by the ICC, including a maximum fee[6] of $10 per vehicle. Carriers paid such fees separately to each state and were issued individual "bingo stamps" for each vehicle, to be placed on a multi-state "bingo card" carried in the vehicle cab.

For calendar year 1991, the system which Michigan had established included a reciprocity arrangement for registering vehicles which were commercially plated in Illinois. As stated by the affidavit of Michigan's most responsible official in this area, Thomas Lonergan, Michigan in 1989 began a policy under MCL 478.7(4) of not charging registration fees to carriers with vehicles registered in states which did not charge Michigan-based vehicles a fee. (Yellow Pet. App. 32a) Illinois was one of

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[5] Effective January 1, 1996, the U.S. Department of Transportation assumed the duties formerly performed by the ICC, including administration of the former ICC regulations at 49 C.F.R. ICC Termination Act of 1995, Pub. L. 104-88, December 29, 1995, 109 Stat. 803, §204; 49 U.S.C. §702. Within that agency, these duties were assumed initially by the Federal Highway Administration and, beginning in 2000, by the Federal Motor Carrier Safety Administration. 49 U.S.C. §113 (Supp. V 1999)

[6] Michigan's vehicle registration fee for interstate operations is set forth at Mich. Comp. Laws 478.7, enacted in 1988. Under Mich. Comp. Laws 478.7(4), the annual fee for each vehicle operated in the state under Mich. Comp. Laws 478.7 is $10. The MPSC is permitted to enter into reciprocal agreements with other states which do not charge fees to vehicles licensed in Michigan and is permitted to waive the $10.00 fee in such situations. Yellow Pet. App. 48a.

these states. In calendar years 1990 and 1991, carriers such as Yellow and Schneider were not charged vehicle registration fees for any of their vehicles which were commercially plated in Illinois. [Yellow Pet. App. 32a; Affidavit of Thomas R. Lonergan, November 21, 1996, in *Schneider I*, ¶7(c)] For the registration year beginning February 1, 1992, however, Michigan changed its policy and announced that carriers such as Yellow and Schneider would be charged $10 for each of their Illinois-based vehicles.[7]

On December 18, 1991, the President signed into law the Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. 102-240, 105 Stat. 2146, December 18, 1991 ("ISTEA"). Section 405 of ISTEA modified 49 U.S.C. §11506 to create a streamlined and more efficient system ("Single State Registration System" or "SSRS") for registering vehicles of interstate for-hire motor carriers. The SSRS modifications replaced the former multiple-payment "bingo stamp" system with a "single state" filing concept. Under this system, carriers submitted filings and payments to their home states which covered vehicle registrations and fees for all states in which they operated. The registration states then sent registrations and fees to all other states. The statute provided that states could assess

[7] Michigan made this change by altering its methodology for determining reciprocity. The specific alteration involved applying reciprocity exemptions based on the states in which carriers such as Yellow and Schneider maintained their principal places of business (Kansas in Yellow's case, Wisconsin in Schneider's case) rather than the states in which the vehicles themselves were commercially plated. This change had the effect of eliminating reciprocity fee exemptions for vehicles commercially plated in fee-exempt states such as Illinois if the owners of such vehicles maintained their principal places of business in non fee-exempt states such as Kansas or Wisconsin.

a fee only if the fee was "equal to the fee, not to exceed $10.00 per vehicle, that such State collected or charged as of November 15, 1991." 49 U.S.C. §11506(c)(2)(B)(iv)(III) The statute indicated that the charging of any fees not established by the ICC under SSRS would be deemed a "burden on interstate commerce" so as to be contrary to the Commerce Clause of the U.S. Constitution.[8] 49 U.S.C. §11506(c)(2)(C) (*Yellow Transportation IV* at 43b) Congress specifically directed the ICC to develop standards and regulations to implement the new system. 49 U.S.C. §11506(c)(1)

The ICC's initial proceeding concerning standards for vehicle registration under ISTEA was *Single State Insurance Registration*, 9 ICC 2d 610 (1993). ("*Single State*") Michigan participated as a party in that case. *Single State* at 9 ICC 2d 641. The ICC codified certain of its implementing standards in revised regulations issued at 49 C.F.R. §1023. Other standards merely were expressed in the body of the *Single State* decision. Later that same year, the ICC opened a supplemental notice and comment proceeding and issued additional standards for applying ISTEA. *American Trucking, supra*, 9 ICC 2d 1184 (3b-21b)

As noted above, the decision in *American Trucking* is particularly significant to this case because it addresses the substantive issue of this petition. As indicated previously, carriers such as Yellow and Schneider which operated vehicles commercially plated in Illinois were paying no fees to Michigan for operation of those vehicles in Michigan as of the determination date under ISTEA of November 15, 1991. Michigan, however, had announced

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[8] *U. S. Constitution, Article I, Section 8, Clause 3.*

increased 1992 fees for such vehicles prior to that date and had begun to accept advance payments of those fees.

After learning that Michigan intended to claim that its announcement and advance collection of future fees made such fees "collected or charged as of November 15, 1991" within the meaning of ISTEA, Yellow submitted the fee calculation question to the ICC through comments in the *American Trucking* proceeding. In those comments, Yellow specifically raised the issue of whether the statutory language limiting fees to those "collected or charged as of November 15, 1991" related to the fees charged for actual operations on that date, as opposed to fees which states might have begun to collect on that date for the succeeding year. The ICC's decision described Yellow's position as follows:

> Yellow raises the issue of whether the statutory language concerning the fee charged on November 15, 1991, relates to fees charged for the 1991 registration year or the 1992 registration year. (Under the "bingo" regulations, carriers filed applications between October 1 and December 31 for stamps or identification numbers for the ensuing year.) Yellow points out that it paid a State zero fees covering 1991 operations and $10.00 per vehicle fees covering 1992 operations. However, Yellow paid the 1992 fees prior to November 15, 1991. It would have the Commission conclude that the focus of the statute is on the 1991 registration year and that the fee for 1992 is not germane. *American Trucking*, at 9 ICC 2d 1192. (14b)

The ICC responded to Yellow's position as follows:

> *Other matters.* Yellow has raised the issue of whether the statutory language concerning the

> "fee charged or collected as of November 15, 1991[,]" relates to fees charged for the 1991 registration year or for the 1992 registration year. We think it clear that the statutory language concerns only fees charged or collected for the 1991 registration year, and we so find. *American Trucking* at 9 ICC 2d 1195. (18b)

The ICC thus held that a state such as Michigan which had charged fees of zero for operations of particular categories of vehicles on November 15, 1991, was required to continue to charge zero fees for those vehicle categories under the ISTEA statute, even though prior to November 15, 1991, it had announced higher fees for the following year and begun to accept voluntary payments of those fees. This is the precise finding which Yellow and Schneider have sought to apply in these cases.

2. Litigation History

As a result of the ISTEA legislation and the ICC's subsequent implementation actions, Yellow and Schneider made specific inquiries to confirm that vehicles commercially plated in Illinois could be registered for Michigan operations without a fee payment, in the same manner as had been the case for calendar year 1991. They were told, however, that Michigan insisted on a full $10.00 per vehicle fee for Illinois-based vehicles if carriers' principal places of business were located in non-exempt states. Yellow and Schneider accordingly submitted such payments for Michigan to their base states (Kansas or Wisconsin) indicating that such payments were under protest. They subsequently filed verified notices of claim with the Michigan Court of Claims with respect to these fee payments and

then filed Complaints with the Michigan Court of Claims seeking a refund and future relief.

In the Yellow litigation, following cross motions for summary disposition, the Michigan Court of Claims on March 13, 1996 issued its opinion in *Yellow Freight I* granting summary disposition for Yellow. The Court of Claims opinion was based on its finding that it was required to follow the ICC's resolution of the fee issue under the ISTEA as set forth in *American Trucking*. (Yellow Pet. App. 28a-29a) On Michigan's appeal, the Michigan Court of Appeals issued its opinion in *Yellow Freight II* affirming the Michigan Court of Claims. (22b-39b)

In the Schneider litigation, again following cross motions for summary disposition, the Michigan Court of Claims on November 24, 1997 issued its opinion in *Schneider I* granting summary disposition for Michigan. (Schneider Pet. App. 21a) On Schneider's appeal, the Michigan Court of Appeals issued its opinion in *Schneider II* reversing the Michigan Court of Claims on the basis of *Yellow Freight II*. (Schneider Pet. App. 9a-10a)

Michigan filed applications for leave to appeal both cases to the Michigan Supreme Court. Leave to appeal was granted in *Yellow* and the Michigan Supreme Court issued its decision in *Yellow Freight III*. The *Yellow Freight III* decision impliedly accepted the position of the Michigan Court of Appeals in *Yellow Freight II* and *Schneider II* but rejected Yellow's claim for fee exempt status on a different basis. The *Yellow Freight III* court took the position that Michigan's non-application of its registration fees to carriers such as Yellow and Schneider as of November 15, 1991 was not required to be given continuing effect because this non-application was based on reciprocity agreements

and because the ICC had erred in giving continuing effect to such agreements. *Yellow Freight III, supra* at 464 Mich. 32. Yellow then sought and was granted certiorari culminating in this Court's opinion in *Yellow Transportation IV* on November 5, 2002.[9]

The *Yellow Transportation IV* opinion held that *Yellow Freight III* was incorrect in finding that the ISTEA language unambiguously precluded the position adopted by the ICC and advanced by Yellow. It referred extensively to the ICC opinions in *Single State* and *American Trucking* adopting standards for implementing ISTEA and found the ICC's justification for those standards reasonable. *Yellow Transportation IV* at 44b, 49b-52b. The opinion noted that although ISTEA was silent on the issue of whether or not reciprocity agreements should be considered in determining the level of fees required to be frozen, it was the ICC's proper role to resolve any ambiguities and fill in any holes in the statutory scheme. (51b) This Court accordingly ordered that the opinion in *Yellow Freight III* be reversed and that the case be remanded for further proceedings not inconsistent with the opinion in *Yellow Transportation IV.* (52b)

On remand, the Michigan Supreme Court entered orders in the *Yellow* and *Schneider* proceedings vacating

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[9] In the Schneider litigation, following the issuance of *Yellow Freight III*, the Michigan Supreme Court vacated *Schneider II* and remanded the case to the Michigan Court of Appeals for resolution of remaining issues in light of *Yellow Freight III*. The Court of Appeals decided those issues in *Schneider III*, partly in Schneider's favor and partly in Michigan's favor. Schneider then applied for leave to appeal *Schneider III* to the Michigan Supreme Court. Schneider's application was ordered held in abeyance pending the outcome of *Yellow Transportation IV*.

Yellow Freight III and *Schneider III* and remanding the cases to the Michigan Court of Appeals.[10] In *Yellow Transportation V*, the Michigan Court of Appeals reaffirmed its prior decision in *Yellow Freight II*, stating that its *Yellow Freight II* decision "stands on substantially stronger ground" as a result of this Court's decision in *Yellow Transportation IV*. (Yellow Pet. App. 9a) The Michigan Court of Appeals also issued an opinion in *Schneider IV* adopting the same conclusion it reached in *Yellow Transportation V*. (Schneider Pet. App. 5a) The Michigan Supreme Court issued identical orders on April 9, 2004 denying applications for leave to appeal the *Yellow Transportation V* and *Schneider IV* opinions.

REASONS FOR DENYING THE PETITIONS

Nothing in these petitions warrants the Court's further attention. The Court already has given explicit instruction in *Yellow Transportation IV* as to how the *Chevron* principles should be applied to the statute and agency determinations involved in this case. Since the ICC announced its interpretation more than ten years ago, no other state has sought to challenge the ICC's interpretation or apply the fee date provisions of the statute in the same manner as Michigan. There are no other cases – anywhere – involving the fee date interpretation issue. Of

[10] The remand order in part directed the parties to brief two issues which had been raised by the Solicitor General in his *amicus* brief in *Yellow Transportation IV*. On brief, all parties agreed that these issues either had been waived or had no bearing on the remaining issues in the case. *Yellow Transportation V* at 7, 8. Michigan did not raise either of these issues in its Applications for Leave to Appeal to the Michigan Supreme Court following *Yellow Transportation V* or *Schneider IV*.

the 17 Michigan judges who considered this issue at the various stages of the Michigan court proceedings, only two accepted Michigan's interpretation. No action is needed from this Court[11] to prolong Michigan's untenable position that its theory reflects the sole permissible construction of the statutory fee date language and that the ICC's interpretation of the statute thus can be disregarded.

Michigan, moreover, does not contend that the Michigan courts misstated the applicable law. Michigan agrees that the applicable standard for determining whether deference must be afforded to the ICC's ruling in *American Trucking* is that set forth in *Yellow Transportation IV*. It cites no instance where the Michigan courts misstated this standard or otherwise failed to articulate a proper explanation of how this Court's *Chevron* standard should be applied. Michigan's position that *Chevron* deference is required only where a statute is ambiguous also is accepted in the Michigan court decisions. *Yellow Freight II* at 27b; *Yellow Transportation V* at Yellow Pet. App. 9a Michigan's only criticism of its own courts' actions is that they failed to interpret the involved portion of the ISTEA

[11] The issue in this case is distinct from the issues in the group of three cases currently pending before this Court in Nos. 03-1230, 03-1234 and 03-1250. While those cases also involve per-vehicle fees charged to motor carriers by the MPSC, the fees arise under a different statutory provision applicable only to vehicles commercially plated in Michigan [Mich. Comp. Laws 478.2(2)]. Nos. 03-1230 and 03-1250 do not involve the ISTEA statute; No. 03-1234 does not involve a prior agency interpretation of ISTEA so as to require *Chevron* deference. A Michigan filing with this Court has distinguished the case in No. 03-1234 as one in which "neither action by nor an order of a federal agency is at issue." Brief of Respondents Michigan Public Service Commission, *et al.* in Opposition to Petition for Writ of Certiorari, No. 03-1234, *Mid-Con Freight Systems, Inc. v. Michigan Public Service Commission*, May 3, 2004 at 19.

statute as unambiguously requiring the position advanced by Michigan. At best, such an argument is nothing more than a claim of misapplication of a properly stated rule of law which is not appropriate for a grant of certiorari. Sup. Ct. R. 10

I. The ICC's Ruling in *American Trucking* is Based on a Reasonable Interpretation of ISTEA Which is Entitled to Deference Under *Chevron* and *Yellow Transportation IV.*

The decisions of the Michigan Court of Appeals in *Yellow Freight II*, *Schneider II*, *Yellow Transportation V*, and *Schneider IV* represent solidly based determinations that the ICC's resolution of the fee date issue in *American Trucking* constitutes a reasonable interpretation which is not foreclosed by the specific language of the ISTEA statute. The issue faced by the ICC in *American Trucking* and by the Court of Appeals in *Yellow Freight II* was application of the pertinent portion of ISTEA to the bingo stamp fee practices in place as of November 15, 1991. As noted previously, the pertinent portion of ISTEA requires that states establish a fee system that "will result in a fee * * * that is equal to the fee, not to exceed $10 per vehicle, that such state collected or charged as of November 15, 1991." 49 U.S.C. §11506(c)(2)(B)(iv)(III).

It is undisputed that on November 15, 1991, Michigan did not require payment of *any* registration fees for vehicles which were commercially plated in Illinois. This fact is established by affidavit evidence submitted by Michigan itself through its primary witness, Thomas Lonergan. Witness Lonergan stated that at the time pertinent to this case,

* * *

> i. The [Michigan] Public Service Commission made a policy decision not to charge a fee to carriers with vehicles registered in states or provinces which did not charge Michigan-based carriers a fee.
>
> j. Under the above-described system, Yellow Freight which had 3,730 vehicles base plated in Illinois and Indiana, was not charged for those cab card stamps as those states did not charge fees for vehicles based in Michigan. * * * *This system was in effect for calendar years 1990 and 1991.* (Yellow Pet. App. 32a) (emphasis added)

This affidavit accordingly indicates that the zero fee system applicable to Yellow, Schneider and other similarly situated carriers would have been in effect on the determination date under the ISTEA statute, November 15, 1991.

Michigan does not claim that its September 1991 announcement of a new policy for 1992 had any impact on the operations of carriers during 1991. It presented no evidence of any instance in which it sought to require carriers that would have been subject to higher fees under the 1992 system to also pay these higher fees for the portion of 1991 following the date of the September 1991 announcement. To the contrary, Michigan's own documentation makes it clear that the zero fee policy for Illinois-plated vehicles would have applied to the specific situation in which a motor carrier might have sought to register vehicles for Michigan operations on the actual determination date of November 15, 1991, itself.

In the Instructions to the Interstate Cab Card Stamp Application provided by witness Lonergan for the operating

year beginning February 1, 1991 (1b-2b), Michigan told carriers that when the application form was used to apply for registration stamps as a part of an annual renewal, another blank form would be returned with the stamps "for possible use *during* the time period to *add additional vehicles* to your fleet" (emphasis added). The Instructions also provided that the annual time period to which the Instructions were applicable was the period from February 1 until January 31 of the following year and that the stamp fees were "subject to change annually."

Under these Instructions, in other words, if a carrier had needed to add additional Illinois-plated units to its Michigan interstate fleet to perform operations between November 15, 1991, and the end of the 1991 registration year, it would have registered those vehicles using the same forms as it used initially to register vehicles for the 1991 registration period and would have been entitled to the same per-vehicle fee of zero that had been applicable at the beginning of that period. Within the meaning of the statutory language, it thus is clear that "the fee * * * collected or charged as of November 15, 1991" to allow Illinois-plated vehicles to operate in Michigan on that date was *zero*.

Although Michigan argues that ISTEA can be interpreted to treat Michigan's advance acceptance of higher 1992 fees before November 15, 1991, as "collection" or "charging" of those fees as of that date, the statutory language does not foreclose the interpretation reached by the ICC. Among the dictionary definitions of "collect" or its derivatives are "to obtain payment or liquidation of * * * a

debt or claim"[12] and "debts, obligations, demands, liabilities that one may be made to pay by means of legal process."[13] Dictionary definitions of the alternative statutory term "charge" include "to impose a burden, duty, obligation or lien; to create a claim against property; to demand, * * * to impose a tax, duty, or trust; * * * to bill or invoice."[14] All of the foregoing definitions suggest that in order for an amount to be "collected," the amount must be owed, and that in order for an amount to be "charged," the amount must be demanded or made due.

As the 1992 fees would not have been due until February 1, 1992, the above definitions would suggest that Michigan's willingness to accept voluntary advance payments of these fees on November 15, 1991 would not constitute "collection" or "charging" of these fees. This conclusion was stated expressly by the Michigan Court of Appeals as a basis for concluding that the ICC's interpretation was preferable. *Yellow Freight II* at 28b, *Schneider II* at Schneider Pet. App. 9a Choosing the fees that were actually required on that date, rather than fees that were being paid voluntarily in advance, constitutes a logical choice on the part of the ICC in accord with accepted usage of the statutory terms "collected" and "charged."

Chevron and its following case law do not permit courts to substitute their interpretation of a statute for that of an agency when multiple interpretations of the statute are possible. The test under the *Chevron* case law rather is whether the underlying statute "unambiguously

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[12] *Black's Law Dictionary, Fourth Edition* (1951)

[13] *Id.*

[14] *Id.*

forbids the Agency's interpretation," is "manifestly contrary to the statute", or is "arbitrary or capricious in substance." *Barnhart v. Walton*, 535 U.S. 212, 218 (2002); *United States v. Mead Corp.*, 533 U.S. 218, 227 (2001). Nothing in the ICC's interpretation of the statute can be found to be so profoundly contrary to the statutory language so as to fall into these categories.

The ICC's interpretation also makes more sense than the interpretation advanced by Michigan in furthering the overall legislative purpose of Congress in enacting the ISTEA statute. The clear purpose of the statute was to guarantee that motor carriers would not be required to pay increases in fee levels beyond those in place as of November 15, 1991. As the Solicitor General noted in his prior brief to this Court, "there is no indication that Congress intended to allow the States to raise their registration fees at the expense of motor carriers; indeed, Congress gave every indication that it intended to minimize the costs of state registration." *Amicus Curiae* Brief of the United States in *Yellow Transportation IV* at 11 The U.S. House Conference Report described the purpose of this statutory language as follows:

> States will not be allowed to charge a greater fee * * * than the fee they charge under the former program as of November 15, 1991. *H.R. Conf. Rep. No. 404*, 102 Cong., First Sess. 437 (1991) reprinted in 1991 U.S.C.C.A.N. at 1818

The ICC also stated in its general rulemaking proceeding that the purpose of the statute was that "fees be frozen as of November 15, 1991," so as to cause "the burden of the registration system for carriers [to] be reduced." *Single State* at 9 ICC 2d 618. The U.S. Court of Appeals for the District of Columbia stated that the purpose of the statute

was that a "state may not charge more than was charged or collected in the past." *National Association of Regulatory Commissioners v. ICC*, 41 F.3d 721, 729 (D.C. Cir. 1994) (emphasis added) None of these purposes would be served by interpreting the ISTEA statute to allow Michigan to charge the higher 1992 fees to carriers such as Yellow or Schneider that were paying no fees at all for operations on the ISTEA determination date itself.

Whether or not the ICC's interpretation is the only possible reading of the statute, it clearly is a reasonable and thus permissible one. To paraphrase the Court's opinion in *Barnhart v. Walton*, "The statute's complexity, the vast number of [trucks and trucking companies it affects], and the consequent need for agency expertise and experience [should] lead [a court] to read the statute as delegating to the [ICC] considerable authority to fill in, through interpretation, matters of detail related to its administration." *Barnhart v. Walton, supra*, 535 U.S. at 225. If there ever was a "matter of detail" suitable to be resolved by agency decisionmaking, this is it. The ICC clearly was the appropriate body to make a choice between using the actual fee and using an announced but not yet effective fee in determining the statutory meaning of "the fee * * * collected or charged as of November 15, 1991." The Michigan Court of Appeals acted correctly in deferring to the ICC's interpretation.

II. This Court's Opinion in *Yellow Transportation IV* Supports the Michigan Court's Actions.

This Court's opinion in *Yellow Transportation IV* provides added support for the decisions of the Michigan Court of Appeals in *Yellow Freight II*, *Schneider II*, *Yellow*

Transportation V and *Schneider IV*. *Yellow Transportation IV* provides substantial guidance to lower courts on how to apply the ICC's decisions implementing ISTEA in subsequent interpretations of the ISTEA statute. In every respect, these guidelines support the analysis and outcome of *Yellow Freight II*. As the Michigan Court of Appeals noted in *Yellow Transportation V*, the conclusions reached initially in *Yellow Freight II* stand on substantially stronger ground as a result of this Court's opinion in *Yellow Transportation IV*. (Yellow Pet. App. 9a)

Yellow Transportation IV initially confirmed that the ICC decisions implementing ISTEA are entitled to full deference from subsequent reviewing courts under the principles announced in *Chevron*. *American Trucking*, the decision to which the Michigan Court of Appeals deferred in *Yellow Freight II*, is specifically referenced in *Yellow Transportation IV* as one of the ICC decisions to which deference was required. (49b) This Court noted that the ICC in promulgating standards for implementing ISTEA was acting under an express delegation of authority from Congress directing the ICC to promulgate standards for implementing the new Single State Registration System. 49 U.S.C. §11506(c)(1) (48b). The Court stated that express Congressional authorization to issue regulations or set standards is a "very good indicator of delegation meriting *Chevron* treatment." *Id.*, citing *United States v. Mead Corp., supra*, at 533 U.S. 218, 229. Under *Yellow Transportation IV*, courts seeking to interpret ISTEA are required to defer to the ICC's construction of the ISTEA statute as long as the ICC interpretation is reasonable. (50b)

Yellow Transportation IV also sets standards for determining the degree of required *Chevron* deference that are in complete accord with the standards followed by the

Michigan Court of Appeals in its *Yellow Freight II* opinion. *Yellow Freight II* found very clearly that the ISTEA statute was silent on the question of how the phrase "collected or charged as of November 15, 1991" should be applied to a situation in which a state was charging one fee for operations on that date but had announced and begun advance collection on that date of a different fee applying to the following year. The *Yellow Freight II* opinion stated specifically that

> We do not believe Congress had an intention on the precise question at issue. * * * Because the statute does not reveal Congressional intent, we should defer to the ICC's interpretation unless it is unreasonable. (28b) (Citations omitted)

This very same lack of Congressional intent was found in the portion of ISTEA analyzed in *Yellow Transportation IV*. This Court noted specifically that courts are required to defer to the action of agencies such as the ICC "to resolve any ambiguities and fill in any holes in the statutory scheme." (51b) The Court specifically referenced its opinion in *Barnhart v. Walton, supra*, at 535 U.S. 212. (49b) The referenced text of *Barnhart* states that the fact that a "particular statutory provision says nothing explicitly about [a particular subject] * * * normally creates ambiguity. It does not resolve it." *Id.* at 535 U.S. 218. The opinion in *Yellow Freight II* thus was in complete conformity with the subsequently announced standards of this Court as to how courts are required to apply ICC interpretations of the ISTEA statute in light of Congressional silence on that statute's proper interpretation.

While *Yellow Transportation IV* did not specifically consider whether 1992 fees paid in advance before November 15, 1991 should be considered fees "collected or

charged as of November 15, 1991," statements of the Court at numerous points indicate that such a construction of the statute is not supportable. For example, *Yellow Transportation IV* describes the ICC's overall policy as "requir[ing] States to preserve fees at the level they actually collected or charged pursuant to reciprocity agreements *in place* as of November 15, 1991." (52b) (emphasis added) As noted previously, it is beyond dispute in this case that the reciprocity agreement "in place" as of November 15, 1991 was the 1991 agreement allowing Illinois-based vehicles to operate on Michigan highways on that date without payment of any bingo stamp fees. *Yellow Transportation IV* moreover stated specifically that "under the ICC's rule, where a state waives its registration fee, its 'fee * * * collected or charged' is zero and must remain zero." (50b) This is the precise language referenced by the ICC in *American Trucking* and cited in *Yellow Freight II* to describe Yellow's position that it was paying a state "zero fees" covering 1991 operations. *American Trucking* at 14b; *Yellow Freight II* at 26b

Yellow Transportation IV lastly provides added support for the concept recognized in *Yellow Freight II* that an important goal of ISTEA was to not allow registration fees to rise above the November 15, 1991, levels frozen by Congress. *Yellow Transportation IV* specifically confirms the ICC's discretion to shape its regulations and policies under ISTEA around the fee freeze concept. *Yellow Transportation IV* at 50b, 51b The fee freeze determinations by the ICC in *American Trucking* cited by this Court in *Yellow Transportation IV* occur within three paragraphs of the ICC's resolution of the fee date interpretation issue based on the same concepts. Compare, *American Trucking* at 17b, 18b Deference to *American Trucking* as required by

Yellow Freight II and confirmed in *Schneider II*, *Yellow Transportation V* and *Schneider IV* is thus entirely in accord with the opinion of this Court in *Yellow Transportation IV*.

CONCLUSION

The petitions for writ of certiorari should be denied.

Respectfully submitted,

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